Supreme
DEC

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 73-1596

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., *Petitioners*,

vs.

MOW SUN WONG, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; CALIFORNIA RURAL LEGAL ASSISTANCE

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BRIEF OF AMICI CURIAE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; CALIFORNIA RURAL LEGAL ASSISTANCE

INTEREST OF AMICI CURIAE[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) was founded on May 1, 1968 as a non-profit corporation under the laws of the State of Texas. The headquarters of the organization are located in San Francisco with additional

[1]Letters of consent from both parties have been filed with the clerk.

offices in San Antonio, Los Angeles, Denver, Albuquerque and Washington, D.C. MALDEF's primary purpose is to secure the civil rights of persons of Mexican descent through litigation and education. In its efforts to assist its client community achieve their rights under the law, MALDEF has handled litigation challenging the traditional barriers faced by persons of Mexican descent including discrimination in employment, deprivation of constitutional and political rights, and denial of equal educational opportunities.

California Rural Legal Assistance (CRLA) is a non-profit corporation established under the laws of California in 1966. It is funded by the United States Office of Economic Opportunity for the purpose of providing legal services to the rural poor of California, particularly farmworkers, the vast majority of whom are of Mexican descent. CRLA's administrative office is located in San Francisco and ten regional offices located in rural communities throughout California provide day-to-day services to clients. CRLA's governing board has determined that program resources shall be concentrated in the priority areas of employment, education, political and civil rights, and economic development. The organization has been particularly active in impact litigation challenging employment practices which tend to disproportionately exclude persons of Mexican descent.

Both MALDEF and CRLA are particularly concerned about the effects of non-job related hiring criteria which limit employment opportunities for the

client communities whom they serve. *Amici curiae* were founded for the express purpose of alleviating the causes of poverty in the Mexican and Mexican-American communities which they serve. To this end both organizations have been active in litigation in the area of employment discrimination and have thereby developed an intimate familiarity with the hardships caused to their clients by exclusionary policies of employers.

Although Spanish surnamed persons constitute, according to the United States Civil Service Commission's own figures, the second largest minority group in this country, representing about 6% of the total population,[2] they continue to lag far behind in securing jobs with the federal government. For example, only 2.9% of all federal jobs are held by Spanish surnamed employees.[3] Moreover, the average grade held by Spanish surnamed employees under the General Schedule is 6.49 as compared to 8.39 for all other non-minority employees.[4] The arbitrary exclusion of a significant proportion of the Spanish surnamed population from pursuing careers in the federal service has obvious consequences in terms of artificially limiting the pool of applicants from which employees may

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[2]See Civil Service Commission 1969-1970 minority group studies cited at *Federal Employment Problems of the Spanish Speaking*, Hearing before the Civil Rights Oversight Subcommittee, Serial No. 26 (March, 1972), p. 104 U.S. Government Printing Office.

[3]*Minority Group Employment in the Federal Government*, U.S. Civil Service Commission, U.S. Government Printing Office, No. 0600-00723, November 30, 1972, p. 3, Table 1-001.

[4]*Id.* at p. v.

be selected. The perpetuation of the citizenship requirement indiscriminately sweeps from the federal job market large numbers of able-bodied and willing Spanish surnamed workers, who, if afforded the opportunity to compete for jobs, would enable the government to achieve its stated purpose of increasing the number of Spanish surnamed employees.[5]

This action was initiated by four Chinese nationals, permanent resident aliens of the United States, on behalf of themselves and similarly situated non-citizens challenging the citizenship requirement for federal employment imposed by Civil Service Commission regulation, 5 C.F.R. Section 338.101. *Amici curiae* submit this brief on behalf of respondents in order to call to this Court's attention the magnitude of the hardship caused to United States alien residents especially those of Mexican descent by the regulation under scrutiny in this case. In addition, *amici* challenge the premises upon which petitioners' argument is founded: that the power of the federal government over aliens in this country is absolute and unfettered by the due process clause of the Fifth Amendment, and that the Fourteenth Amendment's Privileges and Immunities Clause somehow diminishes the scope of the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process Clause. In

[5]Executive Order 11478, 3 C.F.R. Section 133. Following the promulgation of Executive Order 11478, President Nixon, on November 5, 1970, announced a Sixteen Point Program outlining specific action to be taken by the U.S. Civil Service Commission in order to increase in a significant and dramatic fashion the numbers of Spanish surnamed employees in the federal government.

these and all respects, *amici* concur with the arguments advanced in respondents' exhaustive brief.

The most recent data compiled by the United States Bureau of the Census indicate that in 1970, 2,887,005 non-citizens above the age of 18 years were living in the United States.[6] They constituted 2.2% of all persons above the age of 18 living in this country. Under the Civil Service regulation challenged herein, opportunities for federal employment are foreclosed to this large number of men and women regardless of any other qualifications or fitness for work.

In the five southwestern states of Arizona, California, Colorado, New Mexico and Texas, where the largest portion of immigrants from Mexico settle, 441,230 Spanish surnamed aliens above the age of 18,[7] comprising 1.9% of the work age population, are denied employment in the competitive civil service simply because of their lack of citizenship.

[6]United States Bureau of the Census, United States Summary, Table 194; "Citizenship of the Population by Sex, Race, and Age: 1970."

[7]Data compiled by Census Service Facility, Berkeley, California, November 15, 1974. A state-by-state breakdown of the Spanish surnamed alien populations for the five Southwestern states is as follows:

State	Total population	Spanish surnamed alien population	Percentage Spanish surnamed aliens	Total population over 18 yrs. of age	Spanish surnamed alien population over 18 yrs. of age	Percentage of Spanish surnamed aliens over 18 yrs. of age
Arizona	1,770,900	20,042	1.1%	1,123,123	15,278	1.4%
Colorado	2,207,259	4,461	.2%	1,428,701	3,808	.3%
New Mexico	1,016,000	5,922	.6%	606,077	4,428	.7%
Texas	11,196,730	130,220	.1%	7,180,159	105,525	.1%
California	19,953,134	399,793	2.0%	13,301,356	312,191	2.3%
Total	36,144,023	560,438	1.6%	23,639,416	441,230	1.9%

In California alone 312,191 Spanish surnamed aliens, 2.3% of the population over 18 years,[8] are ineligible under Section 338.101 for federal employment. Even in the fifteen thinly populated rural counties served by California Rural Legal Assistance offices, 39,816 working age people,[9] immigrants from Mexico and other Latino countries, cannot compete for jobs with the United States Government despite any other qualifications which they might possess.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S ASSERTION FEDERAL POWER OVER LAWFUL RESIDENT ALIENS IS FULLY LIMITED BY THE EQUAL PROTECTION PRINCIPLE INCORPORATED INTO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioners' "primary submission" postulates that the power of Congress over immigration and naturalization conferred in Article I, Section 8 of the Constitution, combined with the residue of powers given to the President and to Congress over the national defense and the conduct of foreign relations, are "plenary". (Pet. Br. at 24.)[10] These powers, the argument runs, remove the government's decision to limit federal competitive civil service employment to citizens from this Court's full review and place that decision "beyond the reach of the equal protection

[8] "Citizenship of the Population," *op. cit., supra*, n. 6.

[9] *Id.* Table 25, Spanish American Population.

[10] References to the Petitioners' Brief are cited as (Pet. Br. at ___).

principle". (Pet. Br. at 25.) Yet nowhere do Petitioners explain why the plenary power conferred by the Immigration and Naturalization Clause should be viewed any differently from the other plenary powers conferred by the Article I commerce, armed forces, war powers, or foreign affairs clauses. Each of these powers is subject to the entire panoply of the Constitution's specific individual rights limitations, including the equal protection clause as incorporated by the Fifth Amendment. *See, Johnson v. Robinson,* 415 U.S. 361, 364-365, n. 4 (1974). Indeed, so is the immigration and naturalization power. *Schneider v. Rusk,* 377 U.S. 163 (1964); *Afroyim v. Rusk,* 387 U.S. 253 (1967); *Rogers v. Bellei,* 401 U.S. 815 (1971).

This Court has endorsed a broad range of congressional discretion to implement Article I powers. For example, it is axiomatic that regulations of commerce are within the plenary power conferred on Congress by the Commerce Clause, and may not be challenged unless they infringe some specific constitutional prohibition. E.g., *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1824); *United States v. Darby,* 312 U.S. 100 (1941); *Wickard v. Filburn,* 317 U.S. 111 (1942); *United States v. Brown,* 381 U.S. 437 (1965).

It is equally axiomatic that where individual rights are implicated in the exercise of Article I powers, Congress enjoys only a narrow discretion to select the means by which to implement those powers. In *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), it was held, for example, that Congress may not subject

an ex-serviceman to trial by court-martial. The Article I power to "make rules for the government and regulation of the land and naval forces" did not, according to the Court, "empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause." 350 U.S. at 21-22. Nor does Article I enable Congress to subject civilian dependents of servicemen abroad to trial by military tribunal, *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), or to subject a serviceman to military trial where his alleged crime was not "service-connected." *O'Callahan v. Parker*, 395 U.S. 258 (1969).

In *Trop v. Dulles*, 356 U.S. 86 (1958), this Court determined that Congress could not deprive a wartime deserter of citizenship as an appropriate means to implement the war-related powers of Article I. *Bowles v. Willingham*, 321 U.S. 503 (1944) held that, although national security interests during wartime might justify limitations on litigation rights otherwise enjoyed in peacetime, "even the war power does not remove constitutional limitations safeguarding essential liberties." *Id.*, 356 U.S. at 521, quoting *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426 (1934).

The foreign affairs power is also subject to limitations emanating from other provisions of the Constitution, even though the power to legislate for the regulation of foreign affairs is broader than is the

power to regulate domestic affairs. Thus, although the foreign affairs power is "plenary," it is not absolute. In *Afroyim v. Rusk*, 387 U.S. 253 (1967), this Court denied Congress the power to frustrate the Fourteenth Amendment by depriving a person of his citizenship against his will by "simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted." *Id.*, 387 U.S. at 263.

Even during the course of a military emergency, the war and foreign affairs powers do not justify domestic controls by the Executive that invade congressional provinces or individual rights. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court disapproved President Truman's seizure of the steel mills by which, acting pursuant to his combined war-related and foreign affairs powers, he sought to safeguard national security during a domestic labor dispute. Justice Jackson, in a concurring opinion, stated:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming that that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the nation's armed forces to some foreign venture.

Id., 343 U.S. at 642.

In the *Steel Seizure* case, notably, the Court refused to countenance the President's claim that his

action was authorized by the "inherent powers" of the Executive. Petitioners in the instant suit invoke similar powers to justify the executive order authorizing the Civil Service Commission to use "citizenship" as a qualification for federal civil service employment. (Pet. Br. at 46-48.) Justice Jackson recognized that the claim of "inherent power" is always available to "deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Id.*, 343 U.S. at 646. Justice Jackson also recognized that the very existence of emergency powers tends to create emergencies, affording a "ready pretext for usurpation." *Id.*, 343 U.S. at 650. Clearly, the invocation of the doctrine "inherent powers" is justified only in extraordinary circumstances, and none have been demonstrated by Petitioners in the instant case.

Petitioners posit yet another "plenary" power, the treaty power, identified in Article VI of the Constitution, which they claim, remarkably enough, enables the federal government to deprive both resident aliens and citizens alike of their rights to due process and equal protection of the laws. According to them, "Thus, no treaty could be challenged on the ground that it discriminated against one group of foreign nationals resident here or against citizens." (Pet. Br. at 24.)

A valid treaty does, for example, override a state law on matters otherwise within state control. This was recognized in *Ware v. Hylton*, 3 Dall. 199 (1796). But not even the classic formulation of the treaty

power announced in *Missouri v. Holland*, 252 U.S. 416 (1920), lends itself to the view that treaties permit national action specifically proscribed by the Constitution. In the *Holland* case, the Court expressly noted that the "treaty in question did not contravene any prohibitory words to be found in the Constitution." *Id.*, 252 U.S. at 433. Only upon that basis did the Court permit the Migratory Bird Treaty with Canada to interfere with rights otherwise reserved to the states. By comparison with the Tenth Amendment, which was the sole constitutional limitation at issue in the *Holland* case, the words of the Fifth and Fourteenth Amendments, which are at issue in the instant case, are expressly prohibitory. Moreover, the *Holland* case involved only the issue of the intrusion of national authority into local affairs, i.e., the concerns of federalism, not the more focused concerns of individual rights. As this Court has observed, the Tenth Amendment, "states but a truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941). The constitutional provisions protecting individual liberty are, by comparison, affirmative limitations on all the great powers delegated to the central government. See, e.g., *United States v. Brown*, 381 U.S. 437 (1965).

In *Reid v. Covert*, 354 U.S. 1 (1957), this Court expressly held that neither the language of Article VI, nor anything in the debates which accompanied the drafting and ratification of the Constitution, suggests that an agreement with a foreign nation could achieve that which the Constitution forbids:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

354 U.S. at 17. Notably, even in wartime, this Court has not permitted the unrestricted exercise of the war power that Petitioners now claim inheres in the peacetime exercise of the treaty power. *Trop v. Dulles,* 356 U.S. 86, 1958; *Bowles v. Willingham,* 321 U.S. 503 (1944); *Home Building and Loan Ass'n. v. Blaisdell,* 290 U.S. 398 (1934).

Obviously, Petitioners have confused "plenary" power with absolute and unrestricted power, building their argument on a premise which is both unsupportable and pernicious. "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution". *Reid v. Covert,* 354 U.S. 1, 5-6 (1957).

II. CONTRARY TO THE GOVERNMENT'S ASSERTION THE LAW WHICH CONFIRMS CONGRESSIONAL PLENARY POWER OVER ALIEN ENTRY AND DEPORTATION IS IRRELEVANT TO THIS LAW SUIT.

The case law which Petitioners cite for the proposition that Congress has plenary power "to fix the conditions under which aliens are to be permitted to enter and remain in this country" (Pet. Br. at 42) is irrelevant to the issues presently before the Court. That case law relates only to congressional power over the ingress and egress of aliens and not to congressional power over aliens in other contexts. Analytically the two powers are separate. Petitioners choose to blur them, urging that the expansive power operating in the first context should be held to operate in all other contexts of federal regulation of aliens. Such equivalence of power does not exist. The cases limit plenary or untrammeled congressional power to the context of ingress and egress.

Thus, the *Chinese Exclusion Case,* 130 U.S. 581 (1888), dealt with the power of Congress to prohibit the return of a Chinese alien to the United States following his earlier visit abroad. In *Fong Yue Ting v. United States,* 149 U.S. 698 (1893), the Court endorsed the deportation of an alien who lacked a registration certificate. *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948), invalidated the California denial of fishing licenses to aliens on the ground that it conflicted with the exclusive federal power to regulate immigration and naturalization. In that case, the Court did allude to the broad powers of the federal government "in determining what aliens

shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization". *Id.*, 334 U.S. at 419. Clearly, however, this language confines congressional power exclusively to matters of entry, naturalization and deportation.

Johnson v. Eisentranger, 339 U.S. 763 (1950), involved the wartime treatment abroad of enemy alien prisoners of war; none of these prisoners had ever resided within the territorial jurisdiction of any American civil court and hence were not entitled to the constitutional protections granted to resident aliens. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), as well as *Galvan v. Press*, 347 U.S. 522 (1954), focused on the congressional power to deport subversive aliens because of membership in proscribed organizations. In *Flemming v. Nestor*, 363 U.S. 603 (1960), the Court only examined whether Congress could make the fact of deportation relevant to its regulation of the Social Security system. *Boutilier v. Immigration Service*, 387 U.S. 118 (1967), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), upheld congressional power to deny entry to a homosexual, on one hand, and to a Marxist economist on the other.

This dichotomy between the power to control ingress and egress and the power to regulate the lives and actions of lawful resident aliens is critical; it must be observed if resident aliens are to be accorded any rights under the Constitution whatsoever. This Court having so recently reaffirmed the protection afforded lawful resident aliens under the Fourteenth

Amendment's Equal Protection Clause, *vis-a-vis* the States, *e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973), it now can hardly rule that the federal government is free of the equivalent constraints under the Due Process Clause of the Fifth Amendment. See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk*, 377 U.S. 163 (1964); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). Just as "Congress does not have the power to authorize the individual states to violate the Equal Protection Clause", "*Shapiro v. Thompson*, 394 U.S. 618 (1969), quoted in *Graham v. Richardson*, 403 U.S. 365, 377-378 (1971), Congress and the Executive may not directly violate those guarantees. To sustain its civil service disability, the federal government must meet the same equal protection standard of demonstrating a compelling governmental interest that the States have been required to meet in attempting to justify public employment discrimination. As the Brief of the Respondents shows, the Petitioners are no more successful in meeting this burden than was the State of New York in *Sugarman v. Dougall*, 413 U.S. 634 (1973).

III. THE FRAMERS OF THE CONSTITUTION AND OF THE FOURTEENTH AMENDMENT DID NOT INTEND TO MANDATE SUBSTANTIALLY DISPARATE PROTECTION OF CITIZENS AND LAWFUL RESIDENT ALIENS.

Petitioners rely heavily on the Privileges and Immunities Clause of the Fourteenth Amendment for the proposition that the Constitution itself authorizes preferred treatment for citizens. This proposition is patently false. Neither the Framers of the Constitution nor the Framers of the Fourteenth Amendment intended that alien "persons" within the United States should enjoy rights and protections substantially inferior to those enjoyed by citizen "persons."

In *Reid v. Covert*, 354 U.S. 1 (1947), Justice Black examined the purpose of the Framers of the Constitution to determine whether they intended to permit the trial of civilians in military courts either "under the guise" of regulating the armed forces or under the "necessary and proper" power. He concluded that such a result "would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded." *Id.*, 354 U.S. at 23.

The intent of the Framers is equally unmistakable with respect to the issues presented by the instant suit. The Framers would have found Petitioners' assertion that the decision to limit federal civil service to citizens is beyond limitation by the equal protection principle, equally incredible.

Citizenship was a concept almost totally ignored by the Framers. The Constitution in fact rarely distinguishes between citizens and aliens, probably be-

cause the Founders sought to attract, and not to discourage, immigrants. To that end, the Framers rejected insular attempts to impose exacting naturalization requirements. F. Franklin, The Legislative History of Naturalization In the United States, ch. II (1969). They did limit certain elected offices to citizens, and various Amendments, namely the Fifteenth, Nineteenth, and the Twenty-Sixth, later prohibited discrimination against the right of citizens to vote. Of the great clauses of the Constitution, however, only the Privileges and Immunities Clause of the Fourteenth Amendment presumes to grant rights to "citizens" as opposed to other "persons." All other directives in the Constitution refer to "person," "persons," "the people," or "the accused." Thus the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments apply to any "person;" the Fourth Amendment speaks of "the people" and of "persons;" the First Amendment protects "the right of the people" to assemble and petition government; the Sixth Amendment delineates the rights of "the accused;" and the Ninth and Tenth Amendments reserve to "the people" rights not specifically delegated by the Constitution. At least prior to the passage of the Citizenship and Privileges and Immunities Clauses of the Fourteenth Amendment, then, the concept of citizenship was of minor significance to the Framers.

With characteristic scholarship, the late Alexander M. Bickel observed that:

> No wonder, then, that citizenship was nowhere defined in the original Constitution. It was not

> important. To be sure, implicitly, the citizen has a right freely to enter the country, whereas the alien did not; and implicitly also the citizen, while abroad, could be held to the obligation of allegiance, and might under very specific conditions be found guilty of the crime of treason for violating it, while the alien generally could not. But these were hardly critical points, as the Framers demonstrated by saying nothing explicit about them. It remains true that the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself as bound by certain standards of conduct in its relations with people and persons, not with some legal conduct called citizen.

A. Bickel, *Citizenship in the American Constitution,* 15 ARIZ. LAW REV., 369, 370 (1973).

This lack of concern for distinctions between citizens and non-citizens prevailed undisturbed until enactment of the Fourteenth Amendment, with its definition of United States citizenship and its Privileges and Immunities Clause. Although the Framers of the Fourteenth Amendment took account of citizenship, they did not intend thereby to produce the barrier to the enjoyment of rights by aliens that Petitioners contend it produces. Their primary concerns were to secure the citizenship of the newly "Freedmen" and to guarantee by every means possible their enjoyment of all rights and privileges previously enjoyed only by white people. *See, e.g., Slaughter-House Cases,* 16 Wall. 36 (1873).

Because the *Dred Scott* decision, *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857) had excluded the Negro

from constitutional protection by denying his capacity to secure "citizenship," thereby rooting his inferior status in the Constitution itself, the Congress of 1866 felt it imperative to repudiate that decision in no uncertain terms. Thus only because the *Dred Scott* decision addressed the subject of "citizenship" did Congress address the subject in drafting the Fourteenth Amendment. "In the process, as a matter of syntactic compulsion, of stylistic necessity, as a matter of the flow of the pen, the concept of citizenship was again brought to the fore. Rights were made to depend on it as a convenient device of draftsmanship." A. Bickel, *supra,* 15 ARIZ. LAW REV. at 373.

The author of the Privileges and Immunities Clause was John A. Bingham, a Representative of Ohio. A Republican colleague of his from the House recalled that Bingham himself understood little by the phrase but that such did not deter Bingham. "Its euphony and indefiniteness of meaning were a charm to him." C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, Vol. II, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1971) at 1270. In fact, none of the drafters of the Fourteenth Amendment seemed to know the meaning of the Clause. Senator Howard, the principal proponent of the Amendment, certainly did not, nor did Senator Reverdy Johnson, one of the most respected constitutional authorities of the day who said of the clause, "I do not understand what will be the effect of that." *Cong. Globe,* 39th Cong., 1st Sess, at 3041 (1866). Undaunted, Congress passed the provision, satisfied only that the language would help eliminate the inferior status of Negroes.

Plainly, at least so far as its legislative history is concerned, the Privileges and Immunities Clause of the Fourteenth Amendment is not the constitutional barrier to equal protection for lawful resident aliens that the Petitioners claim. Thus both the Framers of the Constitution as well as the Framers of the Fourteenth Amendment would have abjured any interpretation that the federal government's treatment of non-citizen residents need not be in accordance with the guarantees of Equal Protection and Due Process. (Compare the 1866 statement of Senator Howard that the Due Process and Equal Protection Clauses: ". . . disable a State from depriving not merely a citizen of the United States, but any person, . . . of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State." C. FAIRMAN, *supra,* at 1295).

Just as the Framers of the Privileges and Immunities Clause had great difficulty in articulating its contours, the subsequent history of the clause reveals that those who came after fared little better. Whatever sporadic attempts have been made since the *Slaughter-House Cases,* 16 Wall. 36 (1873), to enlarge upon those rights peculiar to citizenship, the development of the Privileges and Immunities Clause itself has been overshadowed by the growth and elaboration of the Due Process and Equal Protection Clauses. The result is that those Clauses which speak of "persons," as opposed to "citizens," have primary vitality.

In spite of this history, Petitioners point to the list of privileges and immunities announced in *United*

States v. Moore, 129 Fed. 630, 663 (C.C.D.C. Ala.), noting that "citizens" secure under the Privileges and Immunities Clause, *inter alia:* the right "to be protected from lawless violence while in the custody of the United States;" "the right to be exempt from discrimination on account of race, as to equality before the law;" and "the right to be free from slavery or involuntary servitude, except as a punishment for crime." (Pet. Br. at 37-38.)

Do Petitioners mean to assert by this litany of "privileges and immunities of United States citizenship" that resident aliens, lacking that special relation of citizenship to the national government, legally would be subject to brutal violence while in the custody of a federal marshall? Do Petitioners mean to assert that a federal marshall himself would be permitted to perpetrate "lawless violence" in order to coerce a confession of guilt, for example, to be used in a criminal prosecution? May resident non-citizens be subjected to involuntary servitude? And what is the effect of disclaiming, on the one hand, that the rights of aliens to due process and equal protection of laws "can be abrogated by legislative expansion of the Privileges and Immunities Clause" (Pet. Br. at 39), and then, on the other, listing as one of the core attributes of citizenship the right to equality before the law? Surely aliens, too, enjoy these "privileges and immunities."

Whatever irreducible legal significance citizenship bears in our system, "persons" and not "citizens" receive the Constitution's primary protection. For that

reason, for example, deportation procedures have been required to conform to the standards of procedural fairness. See, *e.g.*, C. Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A.J. 34 (1964). And for that reason this Court has progressively expanded its protective role to comport with ever-changing notions of justice in the context of state infringements on the rights of non-citizens. It would be anomalous at the very least, and a major setback for the rights of all aliens, if this Court were to withdraw that protection in this instance.

CONCLUSION

For the above reasons, and for those stated in the Respondents' brief, the decision below should be affirmed.[11]

December 16, 1974.

Respectfully submitted,

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